

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

DIRA REALTY, LLC/CMP IMPROVEMENTS, INC.

and

Case No. 29-CA-29585

**LOCAL 1031, UNITED SERVICE WORKERS UNION,
IUJAT**

DIRA REALTY, LLC/CMP IMPROVEMENTS, INC.

and

Case No. 29-CA-29722

ANTHONY DAVIDSON, An Individual

Ashok C. Bokde, Esq., Counsel for the
General Counsel
*Jonathan D. Farrell, Esq. and Alexander
Leong, Esq.*, Counsel for the Respondent
Andrew R. Grabois, Esq., Counsel for the
Union

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Brooklyn, New York on November 17, 2009 and February 9 and 11, 2010. The charge in Case No. 29-CA-29585 was filed on April 29, 2009 and the charge in Case No. 29-CA-29722 was filed on July 23, 2009. On July 29, 2009, the Regional Director issued a Consolidated Complaint which alleged as follows:

1. That on or about April 27, 2009, the Respondent by Joseph Popack, its owner, (a) interrogated employees about their union activities; (b) directed employees not to sign union cards; (c) directed employees not to join the Union; and (d) directed employees to persuade other employee not to sign union cards.
2. That on or about April 28, 2009, the Respondent for discriminatory reasons discharged Anthony Davidson.
3. That on or about April 29, 2009, the Respondent by Isaac Hagar, its manager, interrogated employees about their union activities.
4. That in or about May 2009, the Respondent by Hagar, created the impression of surveillance.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. Jurisdiction

5 The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. It also is agreed and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

10

a. The Discharge of Anthony Davidson

15 The Respondent is a real estate company that owns and operates a number of apartment buildings in Brooklyn, New York. The Respondent's managers are Joseph Popack, an owner, and Isaac Hagar the Operations Manager.

20 Anthony Davidson was hired by a predecessor company which was taken over by the Respondent in 2004. He was a superintendent which means that in addition to getting a salary, he also received a "free" apartment. Also, he had an arrangement with the former owner whereby he rented the garage to the building he lived in and in turn rented out spaces to the tenants or others who wanted to park their cars. In this regard, he acted as a kind of concessionaire.

25 When the building was taken over by the Respondent, Davidson continued to be the superintendent but a dispute arose between him and the new owners over the garage because the new owners wanted to make arrangements with another person who was willing to pay more for the concession.

30 On June 16, 2008, Davidson was fired and told to vacate the garage space. He also was told to either pay for or vacate his apartment. This generated legal proceedings between the Respondent and Davidson about (a) his entitlement to unemployment insurance benefits and (b) relating to his continued occupancy of the apartment and the garage space. (He did not pay any rent for the apartment and stopped making monthly payments for the garage).

35 There is no contention here that the discharge of Davidson in 2008 was illegal under the NLRA. In fact, it appears that a reason he was discharged was because, contrary to New York law, he failed to occupy an apartment in the building in which he was the superintendent. In this regard, the Unemployment Insurance Appeal Board, based on a hearing before an Administrative Law Judge, (where Davidson failed to appear), issued a Decision dated April 20, 40 2009 denying his claim for unemployment benefits.

45 By letter dated March 11, 2009, and while the various legal proceedings were still pending, the Company offered to employ Davidson, as a handyman, at the minimum wage for an apartment building complex located at 131-141 East 21st Street, Brooklyn, New York. This is a six story multiple dwelling and has about 150 units. On or about March 18, Davidson met with the Company and accepted this position. Davidson started working on Monday, March 23, 2009 and he worked, with other porters, under the direction of superintendent Wycliffe Providence.

50

That the Employer offered to reemploy Davidson, given their legal disputation, seemed surprising to me. ¹ When asked, Popack testified that when he made the offer he didn't expect Davidson to accept; but that when he did accept, he (Popack) felt that he had no choice but to accept Davidson's decision.

While Davidson's unemployment claim was finally determined against him on April 20, 2009, the Employer's eviction suit was still ongoing during Davidson's second period of employment with the Company.

The evidence indicates that Davidson, along with two other employees, visited the Union's office on April 14, 2009 and met with Anna Kuba. Davidson was given a group of union authorization cards and he signed his card on that date. Davidson testified that during the week after he signed his card, he solicited signatures from about 30 other employees by visiting them at their homes. ²

According to Davidson, he collected, (either directly or via other employees), about 75 signed union authorization cards and gave them to Kuba on April 27, 2009. Davidson testified that he did not engage in any conspicuous solicitation and did not disclose his union activity to supervision or management by way of union buttons, displays or conversations. For example, Davidson conceded that he never solicited his superintendent to sign a card and never had any conversations about unions or union activities with Providence or anyone else in management.

On April 27, 2009, Davidson handed into the Union about 75 signed authorization cards.

Davidson was discharged on April 28, 2009.

The Union filed a representation petition on April 29, 2009 and a faxed copy of this was not received by the Company until some time on April 30, 2009. Another copy of the petition, with an accompanying letter, was sent by the Regional Office to the Company by letter dated May 1, 2009. Accordingly, the General Counsel cannot assert that the Company's receipt of the representation petition was the triggering event to Davidson's discharge.

To prove direct knowledge of Davidson's union activity prior to his discharge, the General Counsel adduced testimony from an employee named Dansford Anglin. This testimony, which related to a conversation that Anglin allegedly had with Popack, was confused as to when it happened.

Initially, Anglin testified that even *before* Davidson was rehired (and while Davidson was on unemployment), Popack asked him if anyone had asked him to sign up for a union. Anglin testified that Popack pressed and asked if it was Davidson who had asked him to sign up and that he then admitted that Davidson had done so. According to Anglin, Popack told him that he didn't want Anglin to be involved with the Union and that he, (Popack), and Davidson had problems and that Davidson was trying to hurt him. He also testified that Popack asked him to speak to the other employees and find out if the union thing was real.

After further questioning, Anglin recalled that the above described conversation may have occurred about two days after he signed an authorization card which was on April 17,

¹ As a handyman, Davidson would have received a much lower wage than what he earned as a Superintendent. Also, he would not be entitled to a free apartment.

² A card signed by Dansford Anglin indicates that it was signed on April 17, 2009.

2009. During cross examination, Anglin could not be certain if this or a second conversation with Popack took place before or after Davidson had been discharged.

With respect to the above, Popack acknowledged that he did speak to Anglin about the Union, but that this occurred *after* the representation petition was filed. He denied interrogating Anglin and states that he told him that if there was a union contract there could be a lot of work rules and that this might interfere with the hours that Anglin could work at another job that he had with another company. Popack testified that he told Anglin, among other things, about union dues.

For its part, the Respondent asserts that Davidson was discharged because of his poor work performance since his re-employment in March 2009.³

Davidson worked under the direction of Wycliff Providence, someone who struck me as a no-nonsense type of person. Providence testified that on one occasion, Davidson was given an assignment to do a repair and that he took three hours to do a job that should have taken 15 minutes. He also testified that on another occasion, Davidson took three hours to do a job which he, (Providence), estimated should have taken an hour. Finally, Providence testified that on April 27, 2009, he assigned Davidson to replace a door and lock in a tenant's apartment and that Davidson did not complete this work on that day or do it correctly. Regarding the door repair event, Davidson essentially concedes that there was a problem on April 27, 2009. More significantly, the Respondent called the tenant to testify about this transaction and she testified, among other things, that on the morning of April 28, when Providence came to fix the lock, he told her that "the guy had been messing up... that he had a bad attitude... that he wouldn't listen to him... and that he planned on firing him." As noted above, Davidson was fired later that day.

b. Events after Davidson's Discharge

According to Anglin, he received a phone call from Hager after the petition had been filed wherein Hager said that he saw Anglin on the way to a union meeting and asked how it went. This alleged conversation is completely denied by Hager.

The General Counsel called another employee, whose name is Ohba Young, to testify in this proceeding. Mr. Young testified that on the day after Davidson was fired, he was in the office when Popack asked if Young "had anything to tell him." According to Young he responded; "What, about the Union," and that Popack said "yes." Young testified that he had taken Davidson to the different buildings managed by the Respondent and when Popack asked why, he replied that he didn't see anything wrong with it.

According to Young, a few days later, Popack asked if he knew anything about the Union and what was going on. He states that he told Popack that he didn't know anything and that he only helped Davidson with the cards. According to Young, Popack said that the Union was no good and that Young should approach him about working things out.

Popack testified that he had a conversation with Young on the morning of May 4 or 5, 2009. He testified that after his usual greetings to employees, by asking how things were going and "what's up," Young volunteered that he had helped Davidson sign union cards. According

³ Davidson was also absent from work three out of 25 working days after being rehired. However, on one of those days, Davidson had to appear in court in relation to a pending lawsuit between him and the Company.

to Popack, he was completely shocked because he didn't expect Young to respond to his greeting in that way. Popack testified that "I felt like kind of hurt... and surprised." Popack states that Young replied that there was nothing wrong with going around having union cards signed and that he said alright and that this is where the conversation ended.

Subsequent to Davidson's discharge and the conversations with Young and Anglin, the Union withdrew its petition. But on May 14, 2009 the Union filed a new petition and an election was held on June 18, 2009. The Tally of Ballots showed that 40 votes were cast for the union, 43 votes were cast against union representation and 18 votes were challenged.

Notwithstanding the closeness of the vote, the Company withdrew its challenges and voluntarily recognized the Union. Thereafter, the parties have been engaged in negotiations for a contract and according to a union representative, they were at the time of this hearing, pretty close to reaching an agreement. The Respondent points to its dealings with the Union as evidence of its lack of anti-union animus.

III. Analysis

With respect to the discharge of Davidson, there are three basic questions. First, was the Respondent's management aware of Davidson's union activity before he was discharged on April 28, 2009? Second, if knowledge can be imputed to the Respondent, has the General Counsel made out a prima facie case, in accordance with *Wright Line* that the Respondent was motivated, at least in part, by Davidson's union activities? And finally, were there any events that occurred after Davidson's rehire that could reasonably have given the Employer sufficient reason to discharge Davidson notwithstanding any union activity on his part.

Because Davidson's discharge, occurring within about a week and a half after he began soliciting employees to sign union authorization cards, the timing, by itself, can be construed as circumstantial evidence of both knowledge and anti-union animus. *Best Plumbing Supply*, 310 NLRB 143, 144 (1993). On the other hand, an employer may be able to overcome those inferences if it can show that its decision was motivated by some intervening event that would justify disciplinary action. *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, (2006).

The odd thing about this case is that having been previously discharged, the Respondent was under no obligation to reemploy him. Nevertheless, the Company offered to rehire Davidson despite its ongoing legal battles with Davidson over the apartment that he refused to vacate when he was discharged from his job as a superintendent. And despite the fact that the offer may have been made with the expectation that it would be rejected, Davidson nevertheless decided to return to work as a handyman at a salary below what he had previously earned as a superintendent. (And without a free apartment).

The facts show that about a month after his rehire, Davidson became involved with the Union and started to solicit other employees to sign union authorization cards. This occurred during the period from about April 14 to April 27, 2009. The solicitation of union cards was carried out in a surreptitious manner, but with so many of the employees approached, it seems very possible that management would have become aware of this activity.

The General Counsel tried to prove direct knowledge of union activity by adducing testimony from Dansford Anglin who described a conversation he had with Popack regarding Davidson and union cards. Joseph Popack, although acknowledging that he spoke to Anglin about the Union, placed the conversation *after* Davidson was discharged. And Anglin's testimony showed that he was not really sure if this conversation took place *before or after* Davidson was discharged. Indeed, Anglin placed the first conversation as having taken place

even before Davidson was rehired and this, at least to me, does not make much sense. So, although I am not going to say that Anglin was deliberately giving false testimony, it seems to me that his recollection of the timing of the conversation is too hazy to rely on. Thus, given Popack's assertion that his conversation with Anglin took place after Davidson's discharge, I am not going to rely on Anglin's testimony to prove that the Respondent had knowledge of Davidson's union activities prior to the discharge.

Although the timing of Davidson's discharge in relation to his solicitation of union authorization cards is suspicious, I do note that Wycliff Providence, whose testimony I credit, was unsatisfied with Davidson's work performance and there is no dispute that there was a work related event that occurred on April 27, 2009. As noted above, Davidson was assigned to change the door and lock in a tenant's apartment and did not complete that work on that date. The tenant, who has no interest in the outcome of this case, credibly testified that after Davidson worked on the door, the lock still did not work and that she had to call Providence to get it fixed. She testified that Providence did the work on the morning of April 28 and that he told her that he was not pleased with Davidson and intended to fire him.

The facts show that Davidson was fired later on April 28, 2009 and that on the same day, the Union filed an RC petition with the NLRB's Regional Office. The Employer was sent a fax of the petition that was received on or about April 29, 2009.

Apart from the evidence regarding timing, which is somewhat ambiguous, there is little or nothing to show anti-union animus on the part of the Employer. To the extent that employees Anglin and Young testified about conversations they had with Popack and Hagar, there is nothing in those conversations which would tend to indicate any propensity to retaliate against employees who support the union. At most, the evidence shows a few instances of interrogation and that Popack, on one occasion, told Young that a union was no good and that Young should approach him about working things out.

There is no evidence that the Respondent made any threats to employees; that it made any promises in order to persuade employees to vote against the Union; or that it took any disciplinary actions against any other employees who supported the Union. (Such as Anglin or Young). In fact, the evidence shows that after an election was held, (and despite the fact that challenges were determinative of the outcome), the Employer, instead of seeking to delay the outcome, voluntarily recognized the Union and commenced negotiations.

In light of the above, I am going to conclude that on balance, the General Counsel has, if anything, made out a weak prima facie case, but that the Respondent has demonstrated that it would have discharged Davidson for other non-discriminatory reasons. ⁴ Accordingly, I shall recommend that this allegation of the Complaint be dismissed.

Although I think that Anglin's recollection as to when he spoke to Popack was too indeterminate to conclude that it occurred before Davidson's discharge, it is my opinion, based on demeanor, that his description of the substance of his conversations with Popack and Hagar

⁴ In my opinion, the question as to whether Wycliff Providence had the authority, on his own, to discharge Davidson is of little consequence. There is a degree of variance between the superintendents employed by the Respondent in relation to the number of porters or handyman that each directs. This relates to the size of the apartment buildings to which they are assigned. Providence is the superintendent of one of the larger apartment complexes and I credit his testimony that he decided to fire Davidson.

are believable. Additionally, I conclude that Young’s testimony regarding his conversation with Popack in early May 2009 is believable. I therefore conclude that in this respect, the Respondent unlawfully interrogated employees concerning union activity. See *Rossmore House*, 269 NLRB 1176 (1984), enf. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F. 2d 1006 (9th Cir. 1985).

On the other hand, I do not think that when Popack merely asked Anglin if he had attended a union meeting and how it went, that this by itself, is sufficient to prove the General Counsel’s allegation that the Respondent engaged in the “impression of surveillance.” Further, except as found herein, I conclude that the other allegations of the Complaint have not been proven.

Conclusions of Law

By interrogating employees regarding their union sympathies or support and by interrogating employees about the union sympathies of other employees, the Respondent has violated Section 8(a)(1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The Respondent, Dira Realty, LLC/CMP Improvements, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Interrogating employees about their sympathies or support for Local 1031, United Service Workers Union, IUJAT or asking them to find out how other employees feel about the Union.

(b) In any like or related manner, interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities in Brooklyn, New York, copies of the attached notice marked “Appendix ”⁵ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to

⁵ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since May 1, 2009.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 14, 2010.

Raymond P. Green
Administrative Law Judge

APPENDIX**NOTICE TO EMPLOYEES**

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees about their sympathies or support for Local 1031, United Service Workers Union, IUJAT or ask them to find out how other employees feel about the Union.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the rights guaranteed to them by Section 7 of the Act.

Dira Realty, LLC/CMP Improvements, Inc.

(Employer)

Dated _____ **By** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor

Brooklyn, New York 11201-4201

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.